Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 188.

Filed Dec. 15, 1898.

THE SECURITY TRUST COMPANY, as Assignee of the D. D. Merrill Company, Plaintiff in Error,

vs.

FRANK H. DODD, BLEECKER VAN WAGENNEN and EDWARD H. DODD, Co-partners as Dodd, Mead & Company, Defendants in Error.

BRIEF OPPOSING APPLICATION OF DEFENDANTS IN ERROR TO HAVE THE ENTIRE RECORD CERTIFIED TO THE SUPREME COURT.

EDMUND S. DURMENT,
Counsel for Plaintiff in Error

Supreme Court of the United States.

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THE SECURITY TRUST COMPANY, as Assignee of the D. D. Merrill Company, Plaintiff in Error,

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FRANK H. DODD, BLEECKER VAN WAGENNEN and EDWARD H. DODD, Co-partners as Dodd, Mead & Company, Defendants in Error.

To the Honorable, the Supreme Court of the United States:

The above entitled action having been taken to the Circuit Court of Appeals for the Eighth Circuit on writ of error, and having been argued and submitted for decision, that court certified two questions to this court to be answered to enable the Circuit Court of Appeals to decide the case. The record on that certification was filed in the Supreme Court on the twenty-fifth day of October, 1897, and the cause was docketed and placed on the October Term, 1897, calendar. The cause is now No. 188 on the October Term, 1898, calendar, and I am informed will probably be reached for argument as early as the fifteenth day of January, 1899. The defendants in error at this late day ask that the entire record be sent up under Rule 37 of the Rules of the Supreme Court, in order that the entire case may be determined in the Supreme Court. They suggest that there is one other question than the two certified which they desire to present to the Supreme Court. There prob-

ably is more than one other question which will have to be passed upon in order to a full determination of the case.

The plaintiff in error objects to the entire record being sent up for determination of the entire case by this court at this time. The application comes entirely too late. The preparations for briefing the case have been made, and copy of a portion of the brief prepared for the printer by the plaintiff in error. It is true the brief has not yet been printed, but plaintiff in error cannot safely delay printing the brief until the determination of the application now made by the defendants in error, and the brief will probably be printed before this application can be heard by the court. Moreover, the preparation for briefing has been confined to the questions submitted by the Circuit Court of Appeals, and no other points in the case have been considered by counsel, and counsel cannot fairly be called upon at this late date, in the midst of the press of other engagements, to take up other questions in the case and prepare to brief them.

It seems to me that in all fairness the same rule as applies to *certiorari* for diminution of the record should apply in this case; that the motion should be made at the first term of the entry of the case. (See rule 14.) There is no showing of any reason for the delay in making this application, neither is there any reason shown or intimated why either party will be prejudiced or suffer any loss by leaving the questions involved in the case, other than those certified to this court, for the determination of the Circuit Court of Appeals.

For these reasons the plaintiff in error prays that the petition of the defendants in error to have the entire record certified to this court under Rule 37 be denied.

EDMUND S. DURMENT,
Counsel for Plaintiff in Error

No. 188.

Brief of Durment for

FILED
JAN 7 1899
JAMES H. MCKENNEY,
Clerk

Supreme Court of the United States.

Filed January 7, 1899.

OCTOBER TERM, 1898.

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Brief for Plaintiff in Error.

EDMUND S. DURMENT,
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STATEMENT.

On September 23, 1893, D. D. Merrill Company, a corporation organized under the laws of Minnesota, and doing business in that state, being insolvent, made an assignment to plaintiff in error for the benefit of its creditors, under the provisions of Laws of Minnesota for 1881, Ch. 148, as amended by Laws 1889, Ch. 30.

At the time of the assignment, certain personal property, belonging to insolvent, (stereotyped and electro-typed plates for printing books) was in Boston, Massachusetts, in custody of Mudge & Sons. The plaintiff in error duly qualified as such assignee and entered upon the discharge of its duties as such, and on September 25, 1893, the following notice was served on Mudge & Sons, at Boston, viz:

"Alfred Mudge & Sons,
24 Franklin St., Boston, Mass.

Gentlemen:

I hereby notify you that for Security Trust Company, assignee, I take possession of the plates of the D. D. Merrill Company in your hands.

(Signed.) GEORGE EARNEST MERRILL."

At the time of making said assignment, D. D. Merrill Company was indebted to the defendants in error, all of whom were at all times citizens and residents of the state of New York, on certain acceptances aggregating $1249.98, and also to said Alfred Mudge & Sons, on a certain promissory note for $126.80. On March 1, 1894, Alfred Mudge & Sons duly sold, endorsed and delivered said promissory note to the defendants in error. Thereafter, the defendants in error, citizens and residents of New York, commenced an action in the Superior Court for Suffolk county, Massachusetts, against D. D. Merrill Company, to recover on said note and acceptances, and, a writ of attachment, issuing in said action, the personal property above mentioned (it then being in the possession of Alfred Mudge & Sons, in Boston, Mass.) was seized by the sheriff of that county on March 8, 1894, under the attachment, as the property of said D. D. Merrill Company. Prior to that date the defendants in error and also Mudge & Sons, had knowledge and notice of the assignment. In that action the summons was served on D. D. Merrill Company by publication, judgment entered and such personal property sold to the defendants in error on September 27, 1894, as the property of said company, under execution issued on the judgment. Security Trust Company, assignee, the plaintiff in error, was not a party in that action and did not appear therein.

Claiming that said attachment, judgment, execution and sale

were illegal and amounted to a conversion of the property, Security Trust Company, as assignee, filed a complaint and issued summons in an action in the District Court for Ramsey county, Minnesota, against the defendants in error, to recover for such conversion of the property. Thereafter the defendants in error removed said action to the United States Circuit Court for the District of Minnesota, Third Division, and duly appeared and answered the complaint in the action. Thereupon the parties stipulated certain facts in writing and filed the stipulation, which it was agreed might be read in evidence on the trial, and the defendants in error moved for judgment on the pleadings and facts stipulated. The court granted the motion, and, pursuant to the order of the court made on such motion, judgment was entered August 18, 1896, in favor of the defendants in error, that plaintiff in error take nothing by the action, dismissing the action on the merits and for $33.10 costs.

Thereupon the plaintiff in error sued out a writ of error to the Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment. That court certifies that it desires the instruction of the Supreme Court upon the following questions and propositions of law arising upon the record, to-wit:

First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualification as assignee thereunder vest said assignee with the title to the personal property aforesaid then located in the State of Massachusetts and in the custody and possession of said Alfred Mudge and Sons.

Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice

of such assignment which was given, as aforesaid, to Alfred Mudge and Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully siezed by attachment under process issued by the Superior Court of Suffolk county, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the State of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim.

The deed of assignment involved, which was duly executed, acknowledged and delivered, was as follows, viz:

Copy of Deed of Assignment.

This indenture, made this 23rd day of September, A. D. 1893, between D. D. Merrill Company, a corporation, party of the first part, and the Security Trust Company, a corporation created and existing under the laws of the State of Minnesota, and having its principal place of business in the county of Ramsey and said State of Minnesota, party of the second part.

Whereas, said party of the first part is justly indebted to divers and sundry persons in considerable sums of money, and by reason of losses and misfortunes has become and now is insolvent, and is desirous of making a fair and equitable distribution of its property and effects among its creditors, according to law and the statutes in such cases made and provided.

Now therefore, this indenture witnesseth, that the party of the first part, in consideration of the premises and the sum of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, [had] granted, bargained, sold, conveyed, [transferred], set over and assigned, and by these presents does grant, bargain, sell, convey, trans-

fer, set over, assign and deliver unto the said Security Trust Company, party of the second part, its successors and assigns, all the lands, tenements, hereditaments, appurtenances, goods, chattels, choses in action, claims, demands, property and effects belonging to the party of the first part, wherever the same may be situated, and of whatever name or nature, except such property as is exempt from attachment or sale on execution.

To have and to hold the same, and every part and parcel thereof with the appurtenances, unto the said party of the second part, its successors and assigns.

In trust nevertheless, that the said Security Trust Company shall forthwith take possession of the said premises, property and effects hereby assigned, and shall sell and dispose of the same with all reasonable diligence and convert the same into money, and also collect all such debts and demands hereby assigned, as may be collectible and with and out of the proceeds of such sales and collection shall

First. Pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, including the reasonable and lawful compensation of the party of the second part for its services in executing the said trust;

Second. Pay and discharge in the order and precedence provided by law, all the debts and liabilities now due or to become due from said party of the first part, together with all interest due and to become due thereon, to all its creditors who shall file releases of their debts and claims against said party of the first part, according to chapter one hundred and forty-eight of the General Laws of the State of Minnesota, for the year 1881, and the several laws amendatory and supplementary thereof, and if the residue of said proceeds shall not

be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend to the payment of said debts and liabilities and interest, proportionately on their respective amounts, according to law and the statute in such cases made and provided, and if after the payment of all the costs, charges and expenses attending the execution of said trust and the payment and discharge in full of all the said debts of the said party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then,

Third. Repay such surplus to the party of the first part, its successors and assigns.

And for the more effectual execution of the trust hereby created, the party of the first part does hereby [made], constitute and appoint the party of the second part its true and lawful attorney irrevocable, with full power and authority to do and perform all acts, deeds, matters and things which may be necessary to the full execution of said trust, and for the purpose of said trust to ask, demand, recover and receive of and from all and every person or persons, all the property, debts and demands belonging to the party of the first part, and to give acquittances for the same, and to sue, prosecute, defend and implead the same, and to execute, acknowledge and deliver all deeds and instruments of conveyance necessary and proper for the better execution of said trust.

In testimony whereof the said insolvent has caused these presents to be signed by its president and secretary and its corporate seal to be hereunto affixed this 23rd day of September, A. D. 1893.

(Corporate Seal)

D. D. MERRILL COMPANY,
By D. D. MERRILL,
President.
By LEAVITT K. MERRILL,
Secretary.

ARGUMENT.

The questions certified to the Supreme Court amount to this: How far was the deed of assignment valid and effectual in the State of Massachusetts?

The plaintiff in error claims that assignments of personal property which are valid by the law of the domicil of the assignor are valid in the state where the property may be situated, unless they violate its statutory law or its known settled policy, and that the rule applies to assignments for the benefit of creditors

The defendants in error concede the rule in cases of voluntary assignments, but claim that it does not obtain in cases of involuntary assignments, nor in cases which they term statutory assignments. They contend that the assignment here in question is an involuntary or statutory assignment, that the rule above stated has no application, and that the assignment has no valitidity in the State of Massachusetts. The plaintiff in error asserts that it is a voluntary assignment, and that it was in Massachusetts valid and effectual to pass to the assignee the title to personal property in Massachusetts even though it be held that it is not a voluntary assignment.

This assignment was authorized in Minnesota by *Laws 1889, Ch. 50, Sec. 1*, which section reads as follows:

"That section one (1) of the act entitled 'An act to prevent debtors from giving preference to creditors, and to secure the equal distribution of the property of debtors among their creditors, and for the release of debts against debtors, be, and the same is hereby amended so as to read as follows: Section 1. Whenever any debtor shall have become insolvent, or garnishment shall have been made against any debtor, or property of any debtor shall have been levied upon by virtue of an attachment, execution or legal process issued against him for collection of money, he may make an assignment of all his unexempt property, for the equal benefit of all his bona fide creditors,

who shall file releases of their demands against such debtors, as herein provided; such an assignment shall be made, acknowledged and filed, in accordance with and be governed by the laws of this state relating to assignments by debtors for the benefit of creditors, except as herein otherwise provided; and such assignment, if made within ten days after garnishment shall have been made against the assignor, or within ten (10) days after property of such assignor shall have been levied upon by virtue of an attachment, execution or other legal process against him for collection of money, as aforesaid, shall operate to vacate every garnishment and levy then pending, and to discharge all property therefrom, upon qualification of the assignee, or his successor, as provided by law, unless he shall, within five days thereafter, file in the office of the clerk of the court, where such assignment was filed, notice of his intention to retain all pending garnishments and levies; in which case the same shall inure to the benefit of the creditors under such assignment, and may be prosecuted by such assignee and his successors; provided, however, that such assignment shall not vacate or affect any levy made by virtue of an execution issued on a money judgment entered against such debtor on a complaint which was on file during at least twenty (20) days next prior to entry of such judgment in the court in the county where the defendant resided meanwhile; and provided, further, that the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor or otherwise for the same debt."

It will be noticed that the provisions of this law are not mandatory; that the law does not require the debtor in any case to make an assignment, and no court has jurisdistion to compel such assignment to be made; that it is not made in the course of any legal proceeding, nor as the result of any such. It is also true that in Minnesota the debtor wishing to assign his property for the benefit of his creditors, may choose between making his assignment under the provisions of the section above mentioned, or making it under the provisions of *Gen. Stat. 1878, Ch. 41, Sec. 23.* The difference between the two is that under the first mentioned statute he may require the creditor to file a release of his claim as a condition of participating in the

fund, while under the other there is no such requirement. An assignment under *Laws of 1889, Ch. 30, Sec 1*, is clearly the voluntary act of the debtor, and the deed of assignment in this case purports to be the voluntary act of the debtor. But the defendants in error claim that the condition requiring the creditor to file releases makes it involuntary as to the creditor, and would render it invalid by the common law in Minnesota, and that therefore it must be held to be an involuntary or statutory assignment, and of no force without the State of Minnesota.

It is true that in some of the Minnesota cases the court of that state has declared that an assignment requiring releases by the creditor is involuntary as to the creditor, and in one case has said that such a condition renders the assignment invalid at common law. But notwithstanding those decisions that court has always held such an assignment authorized by our statute to be a voluntary assignment and effectual to convey the personal property of the assignor in every place, and especially has it so held in all its late decisions.

64 Minn. 18, Hawkins v. Ireland.
55 Minn. 345, Covey v. Cutler.
41 Minn. 327, Stahl v. Mitchell.

What validity and effect is to be given to this assignment in Massachusetts, we submit, is to be determined not by the laws of Minnesota, but by the laws of Massachusetts. This assignment does not violate any statutory law of Massachusetts. No statute of that state undertakes to regulate or determine what shall be a valid assignment when made in another jurisdiction. No statute of that state prescribes what effect shall be given in Massachusetts to any assignment made in another jurisdiction. Neither is this assignment in violation of the known set-

tled policy of that state. A comparison of the statutes of Minnesota regulating assignments of this character and of the terms of this deed of assignment, with the statutes of Massachusetts having reference to assignments, shows that the provisions of this deed of assignment are substantially such provisions as are allowed in assignments in Massachusetts, and that so far as the policy of that state is disclosed by its statutory enactments, this assignment does not contravene that policy but is in accord with it.

In Massachusetts, by Pub. Statutes, ch. 157, it is provided:

Sec. 17. The assignment carries all property not exempt from attachment.

Secs. 103, 104. Preferred claims include the preferences allowed in Minnesota, and the balance is distributed among unpreferred claims, in proportion to the claims.

Sec. 81. Provides for discharge from debts.

In Minnesota, by Gen. Stat. 1894, it is provided:

Sec. 4240. The assignment must be of al. unexempt property.

Sec. 4251. Preferred claims are all such as are allowed preference in Massachusetts, and balance is distributel among unpreferred claims in proportion to the claims.

Secs. 4240, 4249, also provide for discharge from debts.

The procedure is similar in the two states. The assigned estate is distributed under the direction of a court and all claims must be proved under oath. The assignee in each state may sue to avoid fraudulent conveyances and preferences, and ample opportunity is given in each state to creditors to receive dividends without releasing the debtor, if his conduct has been fraudulent.

But even though the statutes in Minnesota differed in substantial provisions from the Massachusetts statutes, it would not indicate that the assignment is opposed to the policy of the State of Massachusetts, nor in violation of its statutory provisions. It is possibly true that this assignment, if made in Massachusetts, could be avoided under the Massachusetts statute, but that is not sufficient to make it contrary to the statutes or policy of that state. It is held in Massachusetts, and quite generally in other jurisdictions, that statutes of the state have

but little, if any, weight in determining whether a foreign assignment is effectual to pass personal property in the state; that the statutes of a state are enacted for resident debtors and have no reference to foreign assignments.

The Massachusetts decisions clearly declare the validity in Massachusetts of this assignment.

155 Mass. 114, Frank v. Bobbitt.
137 Mass. 366, Train v. Kendall.
111 Mass 206, May v. Wannemacher.
11 Gray 37, Martin v. Potter.
162 Mass. 190, Sawyer v. Levy.

In the Circuit Court of Appeals it was urged by the defendants in error that only such assignments made in other jurisdictions as would be good by the common law in Massachusetts would be valid in Massachusetts, and that this assignment is invalid by the common law in Massachusetts, because it does not appear to have been assented to by any creditors, and because it contains a condition for releases by the creditors.

As to the proposition that creditors had not assented it may be said:

1. The lower court has certified two questions to this court, and upon that certificate this court must assume that creditors, other than defendants in error, had assented to the assignment.

2. The plaintiff in error claims that under the stipulation of facts filed in the Circuit Court it had the right to have a trial of the action and to give evidence that creditors had assented to the deed of assignment prior to the attachment made by defendants in error. Whether it had such right is one of the questions now pending a decision in the Circuit Court of Ap-

peals. This court must therefore assume that creditors had assented to the deed of assignment.

3. The same objection was expressly urged in *155 Mass. 114, Frank v. Bobbitt*, but it was overruled by the court, and such objection has never been sustained in Massachusetts, except in favor of creditors domiciled in that state.

On the proposition that the condition requiring creditors to file releases renders the assignment invalid at common law, we submit that by the common law in Massachusetts, and under the decisions of the Federal Courts, the condition requiring releases is simply a method of giving preferences and does not render the assignment invalid.

Story's Equity Jurisprudence, vol. 2, sec. 1036.
3 Price (Exchequer) 6 The King v. Watson.
13 Fed. Rep. 872, Mathers v. Nesbit.
7 Peters, 608. Brashear v. Bennett.
128 U. S. 489, Denny v. West.
5 Rawle 221, Thomas v. Jenks.
11 Fed. Cases 295 (4 Mason 206), Halsey v. Fairbanks, (Opinion by Judge Story.) See pp. 303, 304.
5 Mass. 42, Hatch v. Smith.
19 Pick. 281, Nostrand v. Atwood.
5 Pick. 28, Andrews v. Ludlow.

In *13 Fed. Rep., Mather v. Nesbit*, the court shows that the effect of the clause to release is simply a preference. Nelson, J., says, on page 873:

"The insolvent law of Minnesota does not grant a discharge of the debtor on surrender of all his property to an assignee or receiver. The courts are open to any creditor who is not disposed to become a party to the insolvency proceedings, and unless a creditor gives a release to his insolvent debtor he can bring suit

and obtain judgment; but a priority is given to creditors who will release the debtor over those who stand back and do not accept the conditions under which the insolvent's property passes to the assignee or the receiver, and they only can receive dividends from the estate."

In *7 Peters, Brashear v. West*, such clause was held not to invalidate the assignment. The decision was grounded on the holding of the Pennsylvania court, in which state the cause arose. The court seems to be in doubt how the decision ought to go on principle.

In *128 U. S., Denney v. Bennett*, considering the provision of the Minnesota statute relating to releases, the court clearly considered such provision to be in the nature of a lawful preference and said on pp. 495, 496:

"The power is conceded, when not forbidden by the statutes of a state, to a failing debtor to make a general assignment of his property for the benefit of his creditors, as this one does. It is further admitted that in such an assignment, if there be nothing fraudulent otherwise, he can prefer some creditors over others, and that he can secure to some payment in full, while he leaves others who will certainly get nothing out of his estate. When this is done, the creditors who are not provided for in the assignment are left in a worse condition than they are where it is done under the present law, because in the first instance they would certainly get nothing out of the debtors property, though they would retain a right to proceed against him by a judgment and execution; while in the present case they have the option of pursuing that course, or of coming in with the other creditors, executing releases, and obtaining their share of the property assigned. Here, instead of naming the preferred creditors, the assignor gives his property to all who will execute a release of their claims against him. Nobody is required by the statute to do so unless he thinks it is to his interest. The creditor who executes such a release gets his share of the property assigned, while the one who does not receives nothing, unless there may be a surplus left after the payment of the releasors; but he is not hindered or delayed in obtaining a judgment against the debtor, or in levying upon other property, if

such can be found, not conveyed by the instrument, or upon any afterward acquired by the debtor. The latter remains liable, notwithstanding this statute and this assignment, as he always was, for the debt of the non-assenting creditor."

In *27 Fed. Rep.*, *Schuler v. Israel*, the assignment contained a provision requiring releases as a condition of receiving dividends—yet Judge Brewer says of it:

"Valid in Texas, where it was executed, it must be considered valid here, save as it conflicts with the rights of resident creditors."

In *5 Rawle, Thomas v. Jenks*, the court said, on pages 224, 225:

"The difficulty is to understand how he may lawfully manage his right to give a preference in such a way as to secure an advantage to himself in the release of his person and future earnings. And the solution of it is found in the arbitrary control over the order of payment allowed him by the common law, and not restrained by the 13 Elizabeth; which, suffering him to postpone any creditor to the rest, makes participation of the fund before those he may choose to prefer are served, not so much matter of right as of favor. To let a creditor in among the first, therefore, though on condition that he release the unpaid residue of his debt, may be to him a favor instead of a wrong, which may consequently be extended to him on terms, or not at all. Having an unquestionable power of preference of which he is the absolute master, it follows that he may set his price on it, provided it be not a reservation of part of the effects for himself, or anything that would carry his power beyond mere preference."

Thomas v. Jenks is published as a leading case in *1 American Leading Cases* (Hare & Wallace) and in the notes to the case (5th ed., p. 83) the editors seem to understand that in Massachusetts such provision for release does not invalidate the assignment. Judge Story so understood the law to be in Massachusetts as appears from his opinion in *Halsey v. Fairbanks*, (*11 Fed. Cases*) and his equity jurisprudence (*Vol. 2, Sec. 1036 and cases cited there*) above referred to.

In *5 Mass.*, *Hatch v. Smith*, the court said (p. 50):

"There was certainly nothing wrong, when Smith found himself in insolvent circumstances, to disclose his situation to his creditors, and to propose to pay them, in equal proportion, as far as his ability extended; and to obtain therefor a discharge from his debts. On the part of his creditors there was nothing iniquitous in acceding to such a proposal. And if there were any of Smith's creditors, who disliked the terms which were offered, and preferred the chance of obtaining satisfaction by other means, it was competent and right for them to refuse. But there seems no good reason why such refusal should prevent Smith and the other creditors from executing an accommodation, which appears so humane and just."

It was also urged by defendants in error, that this is a statutory assignment; that is to say, it is an assignment in bankruptcy having no force except by virtue of the statute, which is in fact a bankrupt act, and that such statute has no effect beyond the limits of the state. To this proposition we answer:

1. It is not true that such statutes have no effect beyond the borders of the enacting state. Such statutes are binding on the resident debtor, and an assignment made by the debtor at the place of his domicil under such statute, whether it be his voluntary act or the result of legal compulsion, is binding upon him and operates to transfer, as against himself, his personal property wherever situate. He can not in another state claim the property as against his assignee. Probably a purchaser from him with knowledge of the assignment cannot. However, it may well happen, and usually does, that in the foreign jurisdiction such an assignment will be held fraudulent as to certain classes of persons, just as a conveyance may be held to be void for fraud as to some persons and valid as to others, even in the courts of the domicil. If such assignment violates the statutory law of the foreign state, then of course to give it effect would be in fraud of the law

of the state and of every person in the state, and it will in that jurisdiction be void. If by the settled policy of the state, such an assignment be in fraud of the rights of particular classes of persons only, then it is void as to those classes and valid as to all others.

2. It is not true that this assignment has no force except by virtue of the statute. The assignment exists and has its force by reason alone of the debtor's act, by reason of the fact that it is the debtor's contract. The provision for releases (which is the provision it is claimed renders the act obnoxious to the objection) owes its existence to the contract of assignment and in the absence of such provision in the assignment no such condition could be claimed. (See *42 Minn. 22, In the Matter of Fuller*). The only effect of the statute is to provide that it shall be legal for the debtor to make such contract. It is a similar case to statutes regulating the rate of interest. In A state it is lawful to contract for twelve per cent per annum interest. In B state it is unlawful to contract for more than seven per cent. Yet a contract made in state A to be performed there, calling for twelve per cent per annum interest, will be enforced in state B. This, because it is so provided by the terms of the contract and not because of the statute of state A.

To give effect to this assignment in Massachusetts is not to give effect to the statute of Minnesota, but to give effect to the contract of assignment, and to do so because it is a contract not in violation of the statutory laws or the settled policy of the state of Massachusetts.

3. The Minnesota statute is not a bankrupt act.

In *111 Mass. 202 May v. Wannemacher*, and in *137 Mass. 366, Train v. Kendall*, and in *11 Gray, 37, Martin v. Potter*

asignments which depended upon statutory provisions of other states were recognized as valid in Massachusetts.

In *21 How, 144, Livermore v. Jenckes* an assignment substantially such as this, executed in Rhode Island, was held to convey the personal property of the assignor in New York as against creditors resident in New York.

In *3 How, 509, Black v. Zacharie*, the rule is stated in general terms that the law of the owner's domicil is to determine the validity of the transfer or alienation of personalty, unless there is some positive or customary law of the country where it is found to the contrary. It is not intimated that the rule does not apply to transfers which would be invalid but for the provision of some statute in force at the domicil.

In *32 Fed. Rep. 279, Halsted v. Straus*, Justice Bradley held that an assignment made in New York and valid there operated to transfer the title to personalty in New Jersey, though the assignment was such as would have been invalid under the laws of New Jersey, as against a creditor firm of the insolvent one of the members of which firm was a citizen of New Jersey.

27 Fed Rep. 851, Schuler v. Israel, involved an assignment containing a condition requiring releases, which was made pursuant to a statute of Texas permitting such an assignment (*Sayles' Texas Civil Statutes, title 7a, Art. 65c, Vol. 1, page 62.*) It was held to be valid in Missouri, Brewer, J., saying, "4. Valid in Texas, where it was executed, it must be considered valid here, save as it conflicts with the rights of resident creditors. Burrill on Assignm. (3rd. ed.) § 310, and cases cited."

In *128 U. S. Denny v. Bennett, (p. 498)* the court, in considering this Minnesota statute, says:

"* * * The authority to deal with the property of the debtor within the state so far as it does not impair the obligation of contracts, is conceded, but the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature where the creditor is not within the control of the court."

"The Minnesota statute makes no provision for any such release. The creditor who became such after the statute was passed cannot complain that the obligation of his contract is impaired, because the law was a part of the contract at the time he made it, nor can he say that his contract is destroyed and the debtor discharged from it, which is of the essence of a bankrupt law, because no such decree can be made by the court, neither does the law have any such effect, though the obligation of the debtor may be cancelled or discharged by the voluntary act of the creditor who makes such release for a consideration which to him seems to be sufficient."

The defendants in error insisted that plaintiff in error's claim of right to recover in this action rests upon the decisions of the Massachusetts court holding that the title of an assignee under an assignment made in another state will be sustained as against a claim made by one not a citizen of Massachusetts, but will not be sustained as against a citizen of Massachusetts. And they insist that it is not competent for the Massachusetts courts thus to discriminate between its own citizens and citizens of another state. They base their contention on *7 Wall. 139, Green v. Van Buskirk.* We are not prepared to admit that the Massachusetts courts would not sustain the assignee's title as against a citizen of Massachusetts, but whether it would is immaterial. It is settled by the decisions of this court that the case of *Green v. Van Buskirk* does not sustain their contention, and that it is competent for the Massachusetts court to thus discriminate.

133 U. S. 107, Cole v. Cunningham.

We suggest that one ground upon which such discrimination properly may be made is this:

The removal by the assignee of property situate in Massachusetts, thus compelling the citizen of Massachusetts to resort to a foreign jurisdiction to assert his claim, may well be held to be in fraud of the Massachusetts creditor, though not fraudulent as to a foreign creditor who goes into Massachusetts solely for the purpose of availing himself of Massachusetts process to seize the goods.

We submit that the questions certified must be answered in the affirmative.

EDMUND S. DURMENT,
For Plaintiff in Error.